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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MOLLY GREEN, Plaintiff and Respondent, v. HOLDEN GREEN, Defendant and Appellant.	H041948, H043256, H043518 (Santa Clara County Super. Ct. No. CH005487)

Appellant Holden Green pursues three appeals arising from respondent Molly Green's action under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (Elder Abuse Act).[1] He asserts error in (1) the superior court's grant of respondent's initial request in 2014 for an elder abuse restraining order under section 15657.03; (2) the renewal of that order for five years in 2015; and (3) the court's award of attorney fees following renewal of the restraining order. We find no error in the order that is reviewable on appeal and affirm that order. Appellant's remaining contentions pertain to orders that are not within this court's jurisdiction; as to those contentions, the appeals will be dismissed.

Procedural Background

Respondent filed her initial request for an elder abuse restraining order on April 1, 2014, alleging harassment by appellant, her stepson, following the death of her husband

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

of 25 years, George Green. Then 71, respondent alleged that appellant had caused her emotional distress, fear, and physical discomfort by making false and baseless accusations that she had caused George's death through abuse, and by "attempting to use his position as an attorney to intimidate and harrass [*sic*] Molly Green." Respondent's request was accompanied by a letter to appellant from George Green, explaining the reason for the reduced amount of his bequest; a declaration from Stratton Green, appellant's brother; and a declaration from Esme Green, appellant's sister. On June 19, 2014, after a hearing at which respondent, Stratton, and Esme testified, the court granted the request and filed a one-year protective order.

On October 1, 2014, appellant filed an untimely notice of appeal explaining why he believed the June 19, 2014 order to be unsupported by substantial evidence and an abuse of discretion. He subsequently abandoned that appeal.

On January 13, 2015, appellant filed a notice of appeal purporting to appeal from (1) a November 17, 2014 order denying his August 14, 2014 motion to reconsider the June restraining order and (2) a December 17, 2014 order awarding respondent her fees and costs incurred in opposing the motion for reconsideration. (Case No. H041948.) Appellant does not address those orders in his briefs on appeal.

The June 2014 restraining order was set to expire on June 17, 2015. On May 29, 2015 respondent sought a renewal of the order for five years. On June 24 and again on July 22, 2015, appellant moved under Code of Civil Procedure section 170.6, subdivision (a)(1), to disqualify the Honorable Patricia M. Lucas for prejudice against him. Judge Lucas, who had presided over the case since 2014, denied the peremptory challenge as untimely, citing *Astourian v. Superior Court* (1990) 226 Cal.App.3d 720.

On September 23, 2015, after an August 25 hearing at which only appellant appeared, the court filed its order granting the renewal request pursuant to former section 15657.03, subdivision (i)(1). (Stats. 2012, ch. 162, § 227.) The restraining order was thus extended to August 25, 2020.

The court then considered respondent's October 1, 2015 motion for attorney fees and costs. Appellant moved to tax costs on October 16, 2015. Although a minute order includes a ruling granting respondent her attorney fees and costs at a hearing on October 29, 2015, the court's written order was not filed until November 25, 2015. Appellant filed a notice of appeal from that order on March 14, 2016.

On November 12, 2015, appellant filed a notice of appeal purporting to seek review of the August 25 ruling granting the renewal request. In a separate notice of appeal he sought review of the subsequent order denying both his untimely motion for relief from the renewal under Code of Civil Procedure section 473, subdivision (b), and his request for a stay pending appeal. On the same day appellant filed yet a third (untimely) notice of appeal, this one from a nonappealable "6/10/15 ORDER TO ALLOW SUBSTITUTE SERVICE ON A RENEWAL OF A TRO."

Appellant moved for consolidation of his three appeals. This court denied the motion but ordered the appeals to be considered together for purposes of briefing, oral argument, and disposition.

Discussion

1. Scope of Review[2]

Appellant is an attorney representing himself on appeal, as he has been since July of 2015. In his opening brief he addresses the June 2014 initial restraining order, the 2015 renewal order, and the attorney fees associated with the renewal request. He further contends that Judge Lucas abused her discretion by denying his June 24, 2015 disqualification motion under Code of Civil Procedure section 170.6.

[2] Appellant's opening brief lacks a statement of appealability, as required by California Rules of Court, rule 8.204. If he had included one, appellant might have recognized the procedural flaws that foreclose major portions of his argument. Respondent apparently also failed to recognize these defects until we requested supplemental briefing on the evident issues of appealability and timeliness. All further references to rules are to the California Rules of Court.

The June 19, 2014 restraining order will not be addressed, as we are not presented with a timely appeal from that order. As noted earlier, appellant did file an untimely notice of appeal on October 1, 2014, but he abandoned it on January 5, 2015. (Case No. H041732.) His petition to set aside that abandonment decision, filed in this court on August 16, 2016, was denied. We find no ground for reconsidering that ruling; accordingly, we deny appellant's belated request in his supplemental letter brief to reinstate the October 1, 2014 appeal.[3]

In his next notice of appeal, filed on January 13, 2015 (Case No. H041948), he purported to appeal from (1) the November 17, 2014 order denying relief from the June 19, 2014 order and (2) the December 17, 2014 order awarding respondent attorney fees for the June proceeding.[4] It was only in his Civil Case Information Statement for that appeal that appellant claimed that he was appealing from the June 2014 order. Even if he had sought appellate review of that order in his January 13, 2015 notice of appeal, we would have been compelled to dismiss it as untimely. (Rules 8.104 & 8.108.) "The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56; *M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602, 610.) Thus, because appellant has presented no viable

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[3] In that supplemental letter brief appellant asserts that "neither the court nor opposing counsel prepared or served a notice of entry of that judgment. As a result, Appellant had 180 days to file his Notice of Appeal of the restraining order." Appellant supplies no documentation supporting the premise of this assertion, nor does he acknowledge that in his motion for reconsideration of the June 2014 order he noted that he had been served with the restraining order on August 7, 2014.

[4] In his briefs appellant does not address the November 17, 2014 denial of relief from the June 2014 restraining order, which he had sought by motion under Code of Civil Procedure section 1008. The denial of appellant's motion was not a separately appealable order in any event. (Code Civ. Proc., § 1008, subd. (g).)

appeal of the June 19, 2014 restraining order, we lack jurisdiction to consider the merits of his challenge to that order.

The disqualification issue also is not properly before us. The exclusive means of obtaining appellate review of the denial of a disqualification motion is by filing a petition for writ of mandate within 10 days after notice of the order. As appellant did not file a petition for such a writ, he is precluded from challenging the order in this proceeding. (Code Civ. Proc., § 170.3, subd. (d); see *Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274, 300.) In his supplemental letter brief, which he submitted at this court's request, appellant concedes that he "forfeited" the issue pertaining to his Code of Civil Procedure section170.6 challenge.

The renewed restraining order, filed September 23, 2015, was one of three subjects of appellant's November 12, 2015 notice of appeal in case No. H043256.[5] Although in that notice of appeal appellant incorrectly refers us to the August 25 hearing date (at which the court announced its intention to adopt its tentative ruling) rather than the date of the actual order, an order granting a restraining order is appealable. (Code Civ. Proc., § 904.1, subd. (a)(6).) We will therefore construe his notice of appeal liberally and address this issue.

The November 25, 2015 order awarding respondent her attorney fees, challenged in case No. H043518, was an appealable postjudgment order. Notice of entry of the order was served on December 7, 2015. However, appellant did not file his notice of appeal until March 14, 2016, beyond the time allowed for this court to consider it. Subject to exceptions not applicable here, rule 8.104(a)(1) states that a notice of appeal "must be filed on or before the earliest of: [¶] (1) [¶] (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of

[5] The documents associated with the renewal request are found in case No. H043518 as well as case No. H043256.

judgment or a filed-endorsed copy of the judgment, showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment." Appellant had 60 days to file his notice of appeal from the final written order of November 25, 2015, but he failed to do so until March 14, 2016, too late to bring the appeal within this court's jurisdiction.

In the three notices of appeal appellant filed on November 12, 2015, he targeted a June 10, 2015 ruling allowing substitute service; the August 25, 2015 tentative ruling renewing the restraining order; and an October 29, 2015 "Tentative Ruling denying Motion 473(b) and Relief of Stay and Motion to Tax Costs -fees." The October 29 ruling on respondent's costs and attorney fees was a tentative ruling that was not contested by either party. It was therefore not an appealable order.

In his supplemental letter brief appellant ignores the March 14, 2016 notice of appeal and instead treats his November 12 notice of appeal as the operative filing. That notice of appeal, he argues, was simply premature and should be deemed filed on November 25, 2015, the date of the final written order, pursuant to rule 8.104(d).[6] He appears to rely specifically on rule 8.104(d)(2), by pointing out that he filed the notice of appeal "after the Superior Court announced its intended ruling but before the court entered a final judgment." But rule 8.104(d)(2) grants the appellate court *discretion* to treat the notice of appeal as filed from the final order. We decline to exercise that discretion in this case. After receiving the written postjudgment order, appellant, an

[6] Rule 8.104(d) states: "A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment. [¶] (2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment."

active member of the state bar, evidently recognized the need to appeal from that order. He therefore filed the requisite notice of appeal; but he did so too late. Because appellant did not timely appeal from the November 25, 2015 order, we will not address his challenge to the attorney fee award.[7]

2. The Renewal Order

Although neither party accurately cites the standard applicable to appellate review of restraining orders, it is clear that "issuance of a protective order under the Elder Abuse Act is reviewed for abuse of direction, and the factual findings necessary to support such a protective order are reviewed under the substantial evidence test. [¶] We resolve all conflicts in the evidence in favor of respondent, the prevailing party, and indulge all legitimate and reasonable inferences in favor of upholding the trial court's findings." (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1137-1138.) However, where, as here, a party challenges the standard applied by the lower court in exercising its discretion, we apply a de novo standard to this question of law. (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 421.)

Appellant argued below, citing *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1284 (*Ritchie*), that the restraining order could not be renewed unless respondent had a reasonable apprehension of future abuse—a showing she could not make because he had had no contact with her after the first protective order was issued. In *Ritchie*, the Second District, Division Seven, declared the standard for renewal of a domestic violence restraining order under Family Code section 6345 as a finding "by a preponderance of the evidence that the protected party entertains a 'reasonable apprehension' of future abuse." (*Ritchie, supra,* at p. 1290.) The superior court rejected appellant's reliance on that standard, saying simply, "That standard does not apply."

[7] Appellant does not specifically complain about the award of costs.

Appellant maintains that the superior court "applied an incorrect legal standard" in ruling on the renewal petition. He asserts, citing inapposite cases applying Code of Civil Procedure sections 527.6 and 527.8, that the trial court must find a reasonable probability that the defendant's wrongful acts will be repeated in the future. (See, e.g., *Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 496 [issuance of restraining order under Code of Civil Procedure section 527.6 authorized if harassment is likely to recur in the future]; *Cooper v. Bettinger* (2015) 242 Cal.App.4th 77, 90 [restraining order under Code of Civil Procedure section 527.6 may be renewed "only when the trial court finds a reasonable probability that the defendant's wrongful acts would be repeated in the future" but renewal may be based on record underlying original harassment order]; see also *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324 [injunctive relief under Code of Civil Procedure section 527.8 for workplace violence].) As appellant never suggested to the superior court any comparison of those cases to those falling under the Elder Abuse Act, he has forfeited any reliance on authority applying Code of Civil Procedure sections 527.6 and 527.8. Moreover, in *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 137, the appellate court emphasized, distinguishing Code of Civil Procedure section 527.6, that the requisite showing for a protective order under the Elder Abuse Act is the existence of "past abuse, not a threat of future harm."

Appellant further relies on *Ritchie* and on *Gordon B. v. Gomez* (2018) 22 Cal.App.5th 92 (*Gordon B.*), which suggest that a risk of future abuse is necessary for *renewal* of a restraining order. In *Gordon B.*, the Second District, Division One, reversed an order denying a plaintiff's request to renew an elder abuse restraining order against his neighbor. The trial court had believed that the defendant's past conduct was not relevant and instead required recent "specific acts" amounting to " 'a significant threat, a reasonable threat or an act of violence,' " to justify renewal. (*Gordon B., supra,* at p. 96.) The appellate court found the trial court's requirement that the plaintiff show specific acts of further abuse to be error under the Elder Abuse Act. However, the court followed

Ritchie's holding that a protective order may be renewed if the trial court finds " 'by a preponderance of the evidence that the protected party entertains a "reasonable apprehension" of future abuse.' " (*Gordon B., supra,* at p. 99.) Applying that standard, the court held that "the trial court should have considered whether, based upon Gordon B.'s evidence, it was 'more probable than not [that] there is a sufficient risk of future abuse to find [that] the protected party's apprehension is genuine and reasonable.' " (*Ibid*.) The court added that the trial judge should consider the evidence and findings supporting the original restraining order, as well as whether any significant changes in circumstances have occurred—"by asking, for example, 'have the restrained and protected parties moved on with their lives so far that the opportunity and likelihood of future abuse has diminished to the degree [that] they no longer support a renewal of the order?' " (*Ibid*.)

Appellant contends, citing *Gordon B.*, that the court erred in failing to apply the "reasonable apprehension of future abuse" standard. The protective order should not have been renewed here, because "the likelihood of future abuse has diminished to the degree that a five-year order tha[t] included CLETS notification was not necessary to prevent future abuse."[8] Appellant maintains that "there was no evidence upon which the court could have found a reasonable probability that [he] would repeat any of his allegedly wrongful acts . . . when the first restraining order was set to expire." He supports that assertion by reviewing the events preceding the first protective order and assuring us that "[t]he circumstances that led to the upsetting contacts between Appellant and respondent were thus over would [*sic*] never repeat." Based on his conduct since the

[8] At the initial renewal hearing before a different judge, appellant was represented by counsel, who asked the court to issue a "non CLETS stay away" order and then seal the "file" to prevent the case from being accessed by the public. Counsel represented that appellant had had no direct contact with respondent and that he did not want this matter to "impact his [law] practice."

original order,[9] respondent "did not harbor any real apprehension that Appellant would commit abuse [*sic*] future abuse."

Respondent fails to acknowledge *Gordon B.* She maintains, however, that there was evidence that appellant was continuing to harass her by "using his skills as an attorney to file meritless motions, noticing hearings and then failing to appear after Counsel was forced to respond to his pleadings which were never filed with the Court, etc., all with the intent to further harass and intimidate Respondent and cause her ongoing physical, emotional[,] and financial harm."

Because the *Gordon B.* decision postdated the proceedings below, the court had no opportunity to apply it to the circumstances presented here. The court instead followed the plain language of former section 15657.03, subdivision (i), which permitted, as it does now, renewal of the protective order "upon the request of a party, either for five years or permanently, *without a showing of any further abuse* since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party." (former § 15657.03, subd. (i)(1), Stats. 2012, ch. 162, § 227), italics added.)

The *Gordon B.* court noted that this language is identical to that of Family Code section 6345, subdivision (a), which provides for discretionary renewal of a domestic violence restraining order issued under Family Code section 6300. Based on that similarity, the court determined that the "reasonable apprehension" standard formulated in *Ritchie* for renewal of domestic violence restraining orders is equally applicable in the elder abuse context.

A closer examination of the *Ritchie* decision, however, supports the superior court's rejection of that standard in this case. The Domestic Violence Prevention Act

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[9] As evidence of his peaceful conduct since the original order, appellant cites his willingness to compromise with a non-CLETS stay-away order and his pursuit of challenges to the fee and cost awards imposed on him.

defines "abuse" to *include* placing a person in *reasonable apprehension* of imminent injury.[10] The *Ritchie* court based its renewal test on that nonexclusive definition of abuse; accordingly, it said, for either the initial restraining order or a contested extension, the trial court must find "a reasonable apprehension of future abuse"—that is, "it must find evidence [of] some reasonable risk, at least, [that] such abuse will occur sometime in the future if the protective order is not renewed." (*Ritchie*, *supra*, 115 Cal.App.4th at p. 1287.) The protected party's subjective fear is not enough; his or her apprehension must be both "genuine and reasonable." (*Id*. at p. 1290.)

The Elder Abuse Act, however, does not include such a definition of "abuse": instead, for purposes of any initial or renewed protective order under section 15657.03, abuse is defined in terms of the physical infliction of harm or neglect as well as financial abuse.[11] Nowhere does it mention a reasonable apprehension of abuse, much less the "reasonable apprehension of imminent serious bodily injury" that is one aspect of abuse found in the domestic violence context (the aspect relied on in *Ritchie*). Thus, assuming *Ritchie* represents the correct test for renewing orders under Family Code section 6345, we decline to import it into the consideration of a request to renew a restraining order issued under the Elder Abuse Act.

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[10] Family Code section 6203, part of the Domestic Violence Prevention Act, states: "(a) For purposes of this act, "abuse" means any of the following: [¶] (1) To intentionally or recklessly cause or attempt to cause bodily injury. [¶] (2) Sexual assault. [¶] (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320. [¶] (b) Abuse is not limited to the actual infliction of physical injury or assault."

[11] In the Elder Abuse Act, section 15610.07 defines "abuse" as follows: "(a) 'Abuse of an elder or a dependent adult' means any of the following: [¶] (1) Physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering. [¶] (2) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering. [¶] (3) Financial abuse, as defined in Section 15610.30." (§ 15610.07.)

In exercising its discretion pursuant to section 15657.03, subdivision (i)(1), the trial court may, as the *Ritchie* court suggested, consider the evidence and findings supporting the original order to determine whether that order should be extended—as long as it does not "permit the restrained party to challenge the truth of the evidence and findings underlying the initial order." (*Ritchie*, *supra*, 115 Cal.App.4th at p. 1290.) But there is no indication on the record before us that the superior court failed to examine the facts supporting the need for an extension after considering both parties' relative positions. The court considered the application for renewal and the opposition; it gave appellant an opportunity to review its tentative ruling and contest the legal basis for it; and it adopted the reasoning of the tentative ruling only after hearing appellant's oral argument at the August 25, 2015 proceeding. The tentative ruling itself is not in the record designated by appellant;[12] consequently, we must presume that the court properly exercised its discretion in light of current circumstances presented by the parties. (Cf. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [orders are presumed correct; "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown"].) Because there is no affirmative indication of error or abuse of discretion on this record, reversal of the renewal order is not warranted.

Disposition

In case Nos. H041948 and H043518, the appeals are dismissed.
In case No. H043256, the September 23, 2015 order is affirmed.

[12] The final order, however, appears to be quoting the tentative ruling.

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ELIA, ACTING P. J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.

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